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December 2, 1997

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VIA FEDERAL EXPRESS

Ms. Magalie Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

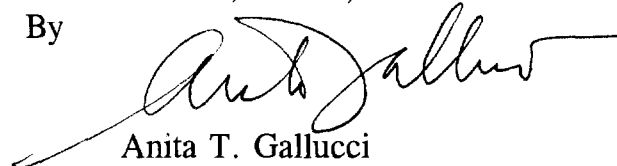
RE: CC Docket No. 97-219

Dear Secretary Salas:

Enclosed for filing on behalf of the City of Rice Lake, Wisconsin, are the original and six copies of the City of Rice Lake's Comments On Petition And Motion To Dismiss Or Deny and Attachments To Comments On Petition And Motion To Dismiss Or Deny, together with a Certificate of Service. Also enclosed is an additional copy of the Comments and Attachments. Please date-stamp these copies and return the same to me in the envelope provided.

Very truly yours,

BOARDMAN, SUHR, CURRY & FIELD
By


Anita T. Gallucci

ATG/jan
Enclosures

cc: Curtis Snyder
Service List

087

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of)
)
CHIBARDUN TELEPHONE COOPERATIVE, INC.)
CTC TELCOM, INC.)
)
Petition for Preemption Pursuant to)
Section 253 of the Communications Act --)
City of Rice Lake, Wisconsin)

RECEIVED
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CC Docket No. 97-2197

TO: The Commission

CITY OF RICE LAKE'S COMMENTS ON PETITION AND
MOTION TO DISMISS OR DENY

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December 2, 1997

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TO: The Commission		

CITY OF RICE LAKE'S COMMENTS ON PETITION AND
MOTION TO DISMISS OR DENY

INTRODUCTION

The City of Rice Lake, Wisconsin ("City") submits these Comments in opposition to the October 10, 1997 Petition for Preemption Pursuant to Section 253 ("Petition") that Chibardun Telephone Cooperative, Inc. and CTC Telcom, Inc. (collectively, "Chibardun") filed with this Commission. For the reasons set forth below, Chibardun's Petition should be denied and the City accordingly moves the Commission to dismiss or deny the Petition.

SUMMARY OF ARGUMENT

Chibardun's Petition should be dismissed or denied because it is procedurally and substantively devoid of any grounds for relief under Section 253(d).¹ The Petition should also be dismissed or denied because it reflects an improper attempt by Chibardun to misuse the pro-competition policies of the Telecommunications Act of 1996² as a means of forcing its way into public rights-of-way without complying with basic rights-of-way access requirements that apply to all telecommunications providers. Chibardun's Petition is based on unwarranted claims that the company has been prohibited from bringing competitive telecommunications service to Rice Lake and has been discriminated against by City policy and personnel. As summarized in this section and shown more specifically below, those claims are wrong and Chibardun fails to meet its burden of demonstrating that it is entitled to relief.

Chibardun's Petition should be dismissed or denied in the first place because it is based on claims that the City improperly exercised its authority to manage and seek compensation for public rights-of-way, claims that are outside of the Commission's scope of review under Section 253(d). Moreover, the Petition is premised on an incomplete and inaccurate portrayal of the background facts. Although Chibardun attempts to paint the picture that the City sought to deny Chibardun access to public rights-of-way to construct a

¹ 47 U.S.C. §253(d).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§151 *et seq.* (hereafter, the "Act").

telecommunications and cable television system in the City, a full review of the facts shows quite to the contrary. As shown below, the City welcomed and continues to welcome telecommunications competition in Rice Lake. In order to address increased use of its rights-of-way and to protect its rights-of-way management and compensation interests, the City needed to revise its rights-of-way management practices. In an effort to facilitate competition while it was reviewing and revising its rights-of-way management practices, the City provided Chibardun with the opportunity to proceed with its plans and sought to work with the company to identify mutually agreeable conditions that would govern Chibardun's rights-of-way use in the interim. Contrary to Chibardun's claims, the City did not prohibit its entry into the Rice Lake market. Instead, it sought to facilitate such entry.

In addition to the incomplete and inaccurate picture Chibardun paints, the substantive arguments raised in the Petition confirm that the company is not entitled to preemption relief. The City shows that Chibardun provides no evidence of either a prohibition or effective prohibition on its ability to provide telecommunications service in Rice Lake. The City also shows that Chibardun's Petition raises unsupportable claims of discriminatory and competitively biased treatment. Specifically, since the City sought to work with Chibardun so that it could have access to the public rights-of-way and since the regulatory requirements Chibardun complains of apply to all telecommunications providers within the City in a non-discriminatory and competitively neutral manner, there is no violation of any provision in Section 253 of the Act.

Finally, the policies that Chibardun propounds and that underlie its Petition are contrary to the pro-competition policies contained in the Act and should not be condoned. Chibardun's communications with the City and the filing of its Petition illustrate that the company has unreasonably and improperly assumed it is entitled to access public rights-of-way without meeting basic regulatory requirements that are necessary for the City to fulfill its rights-of-way management duties. As Commissioner Ness recently described, "Congress has promised new entrants an opportunity to compete, but not freedom from every possible hindrance that may result from state or local regulation." (In the Matter of California Payphone Assoc., FCC 97-251 (released July 17, 1997) (hereafter "California Payphone") (Separate Statement of Commissioner Susan Ness) (emphasis added).) While the City has no dispute that local governments must not prohibit competitive entry, telecommunications providers, including new entrants like Chibardun, also have a duty to act reasonably in complying with basic requirements that are within local government management authority, including rights-of-way use and compensation requirements. The facts below illustrate that Chibardun has not upheld its end of the bargain, and the Commission ought not condone the company's attempts to override the City's rights-of-way management authority.

FACTUAL BACKGROUND

A. Overview.

The City of Rice Lake is a small community of approximately 8,000 residents. (Affidavit of Curtis Snyder, ¶2.) (Mr. Snyder's Affidavit is attached hereto as Attachment A.) The City is located in Barron County in a relatively rural area of northwest Wisconsin.

(Affidavit of Curtis Snyder, ¶2.) At the present time, the City and its residents receive local telephone services from GTE North, Inc. ("GTE"), and receive cable television services from Marcus Cable Partners, L.P. ("Marcus Cable"). (Affidavit of Curtis Snyder, ¶2.) Like many communities that have historically received telecommunications service from monopoly providers, the City has welcomed and continues to welcome the opportunity for its market to become open to competition in the manner provided for in the Act. (Affidavit of Curtis Snyder, ¶3.)

Together with its interests in fostering competitive market environments that could benefit its residents, the City also recognizes that it owes the citizens of Rice Lake a duty to properly manage local rights-of-way in order to protect their welfare and ensure that public rights-of-way users operate in a safe and efficient manner. (Affidavit of Curtis Snyder, ¶4.) Before telecommunications competition came to Rice Lake and there was only one telecommunications provider accessing City rights-of-way, the City was able to manage its rights-of-way through use of the existing municipal ordinances. (Affidavit of Curtis Snyder, ¶5.) Specifically, the City has historically relied upon Title 6, Chapter 2 of the Rice Lake Municipal Code of Ordinances to govern use of City rights-of-way. (Affidavit of Curtis Snyder, ¶5.) (A copy of relevant portions of Title 6, Chapter 2 is attached as Exhibit A to Chibardun's Petition).³ This ordinance requires potential users of City rights-of-way to apply

³ In addition to the Title 6, Chapter 2 regulations that govern use of rights-of-way for telecommunications and other service providers, the City also has in place, and implements, Ordinance No. 647 (hereafter, the "Cable Franchise Ordinance"), which is set forth at Title (continued...)

for and obtain street opening permits before making any opening or conducting any excavation in a right-of-way. See Section 6-2-3(a). Although the City has not previously had a comprehensive ordinance setting forth more specific terms for occupancy and use of its rights-of-way, since there were few entities seeking such use, Title 6, Chapter 2 provided sufficient authority for the City to rely upon to fulfill its rights-of-way management duties. (Affidavit of Curtis Snyder, ¶5.)

The sufficiency of Title 6, Chapter 2 to address increased use of public rights-of-way was brought into question when the competition provided for by the Act first came to the City. (Affidavit of Curtis Snyder, ¶6.) Specifically, when Chibardun announced its plans to build a telecommunications network within the City to provide telephone and cable television services, the City recognized that it needed to assess its existing rights-of-way regulations and to determine whether they were sufficient to protect the City's rights-of-way management and compensation interests. (Affidavit of Curtis Snyder, ¶6.) The City promptly began that assessment and is in the process of reviewing and revising its ordinances to identify what terms and conditions will need to apply to address increased demand for use of its rights-of-way. (Affidavit of Curtis Snyder, ¶6.)

³(...continued)

9, Chapter 4 of the Rice Lake Municipal Code of Ordinances. (Affidavit of Curtis Snyder, ¶7.) (A copy of this ordinance is attached as Exhibit 1 to the Snyder Affidavit.) As reflected by its content, the Cable Franchise Ordinance is in the form of a contract between the predecessor to Marcus Cable, WFRV Television, Inc., d/b/a Rice Lake Television, and the City, and reflects the terms and conditions under which Marcus Cable provides cable television service within the City.

Chibardun has apparently seized on the City's efforts as an opportunity for it to challenge the City's permitting process and the City's efforts to revise its rights-of-way management practices. Although Chibardun's Petition speaks in terms of "alleged anticompetitive and discriminatory right-of-way requirements and fees," see Petition at p.1, upon review, it reveals nothing more than the company's baseless disgruntlement at having to obtain permits without them being "rubber stamped" within the "deadline" that Chibardun itself imposed. This much is evident from the Petition itself, see Petition, at p. 7, 14, and is confirmed further by an accurate presentation of the facts surrounding Chibardun's communications with the City.

In its Petition, Chibardun takes liberties with its presentation of the "background" underlying this proceeding and repeatedly mischaracterizes the content and tenor of its discussions with the City. In several instances, Chibardun blatantly misrepresents the City's actions to the Commission.⁴ Despite Chibardun's attempted portrayal of the "background,"

⁴ Chibardun's misrepresentations were not limited to its Petition. Rather, they continued when Chibardun submitted its November 13, 1997 Opposition to Motion for Extension of Time. Just as it did in its Petition, Chibardun alleged "facts" with no evidentiary support -- facts which are not true. For example, in its Opposition to Motion for Extension of Time, Chibardun's counsel states that "the City has allowed the existing monopoly local exchange carrier (GTE), as well as the existing monopoly cable television operator (Marcus Cable), to proceed with plans to upgrade their systems." (Chibardun Opposition, p. 2.) This is completely false. As explained more fully below, the City has adopted an interim ordinance that requires all rights-of-way users to obtain Common Council approval for construction projects valued at \$50,000 or more. Since the interim ordinance was adopted, GTE has not made any permit applications for any such projects. In fact, GTE has not made permit requests for projects valued at \$50,000 or more since the time Chibardun first made its excavation permit applications in May 1997. (Affidavit of Curtis Snyder, ¶23.)
(continued...)

what is glaringly absent from the company's Petition are any affidavits to support its claims. As the Commission has instructed, claimants should "submit complete and accurate accounts of the facts in their initial pleadings" and these factual assertions should be "supported by credible evidence, including affidavits." (In the Matter of TCI Cablevision of Oakland County, Inc., FCC CSR-4790, ¶77 (released September 19, 1997) (hereafter the "City of Troy.")) The picture Chibardun paints of the "background" should be seen for what it is -- unsubstantiated and in many cases untrue allegations intended to cloud the Commission's view of what took place. A correct description of the background facts surrounding Chibardun's communications with the City is set forth below.

⁴(...continued)

With respect to Marcus Cable, the company has applied for excavation permits, and the City has required the company to comply with the interim ordinance. (See supra pp. 22-23; Affidavit of Curtis Snyder, ¶20.) Chibardun's suggestion that GTE and Marcus Cable are proceeding with system upgrades without requisite approval from the City is unfounded and untrue.

B. Chibardun's Cable Franchise Discussions.⁵

It was apparently Chibardun's plan to request and obtain in less than seven weeks a cable television franchise, plus whatever City approvals were necessary to construct a telecommunications network capable of providing telephone and cable television service. Chibardun directed its efforts first toward obtaining a cable television franchise from the City, when its representatives attended three meetings of the Rice Lake Cable Commission in April, 1997. (Affidavit of Mick Givens, ¶2.) (Mr. Givens' Affidavit is attached as Attachment B.) The first meeting took place on April 15, 1997. Two subsequent meetings were specially scheduled and held on April 23, 1997, and April 29, 1997, to accommodate

⁵ In its Petition, Chibardun goes to great lengths mischaracterizing and trying to paint a negative picture of its negotiations for a cable franchise. See, e.g., Petition, at pp. 4-7. The City certainly disagrees with Chibardun's attempted mischaracterizations, as the fact is that Chibardun was unwilling to accept a franchise on the same terms that applied to the incumbent provider, Marcus Cable, but instead wanted more favorable terms. (Affidavit of Curtis Snyder, ¶9.) As reflected in Title V of the Cable Franchise Ordinance, had the City granted Chibardun more favorable franchise terms, the City would have had to provide those same terms to Marcus Cable or face potential anticompetitive/discrimination claims from Marcus Cable. (See Cable Franchise Ordinance, Title V, Exhibit 1 to the Snyder Affidavit.)

In addition to the incorrect picture that Chibardun presents, the City also takes issue with Chibardun's apparent attempt to cloud the issues in this Title II, Section 253 Preemption proceeding, which is confined to telecommunications matters, to irrelevant "complaints" about its cable franchise negotiations with the City. Although completely misplaced, and incorrect, Chibardun's focus on cable issues in this proceeding raises significant question as to the true motives underlying its filing of the Petition. Regardless of the motives, however, in order to correct Chibardun's mischaracterizations and provide the Commission with a full overview of what took place and what may be behind Chibardun's Petition, the City will describe its review of both Chibardun's cable television and telecommunications requests.

Chibardun's requests. (Affidavit of Mick Givens, ¶7.) Representatives of Marcus Cable attended each of these Commission meetings. (Affidavit of Mick Givens, ¶7.)

At the April 15 meeting, a Chibardun representative informed the Cable Commission that the company wished to discuss the terms and conditions of the cable television franchise ordinance that applied at the time to Marcus Cable (i.e., the Cable Franchise Ordinance). (Affidavit of Mick Givens, ¶3; see also Minutes from April 15, 1997 Cable Commission Meeting, attached as Exhibit 1 to the Givens Affidavit). The Chibardun representative also requested that the Cable Commission meet with Chibardun in a closed session in the absence of Marcus Cable for purposes of negotiating the changes it wanted to this franchise ordinance. (Affidavit of Mick Givens, ¶3.)

To accommodate Chibardun and determine whether it could legally conduct such negotiations in a closed session under the Wisconsin Open Meeting Law requirements,⁶ the Commission set a meeting for the following week. (Affidavit of Mick Givens, ¶5.) During the interim, the Commission was advised by the City Attorney that there was no legal basis for closed negotiation sessions with Chibardun. (Affidavit of Mick Givens, ¶6.) In accordance with that advice, the Cable Commission ultimately declined to negotiate changes

⁶ Wis. Stats. §§19.81 *et seq.* Under the Wisconsin Open Meetings law, "all meetings of all state and local governmental bodies [are to be] publicly held in places reasonably accessible to members of the public and [are to be] open to all citizens at all times unless otherwise expressly provided by law." Wis. Stats. §19.81(2). The law also contains certain specified exemptions to the open meetings requirement. See Wis. Stats. §19.85.

to the Cable Franchise Ordinance in a closed session.⁷ (Affidavit of Mick Givens, ¶6.) It did, however, accommodate Chibardun's request for special meetings to discuss the terms of the Cable Franchise Ordinance. (Affidavit of Mick Givens, ¶7.)

At the April 23 Cable Commission meeting, Chibardun's General Manager, Mr. Rick Vergin, gave a brief presentation in which he discussed the company's plans to construct a cable television system in the City. (Affidavit of Mick Givens, ¶9; see also Minutes from April 23, 1997 Cable Commission Meeting, attached as Exhibit 2 to the Givens Affidavit). Mr. Vergin discussed the plans only in very general terms, and stated that Chibardun had targeted June 1, 1997, less than six weeks away, to start construction of its system. (Affidavit of Mick Givens, ¶9.) During the presentation, Mr. Vergin indicated that Chibardun would be asking the Cable Commission to make changes to the existing Cable Franchise Ordinance by allowing Chibardun three years to offer cable service to the entire City and by eliminating the requirement that it maintain a local office within the City. (Affidavit of Mick Givens, ¶9.) Mr. Vergin also told the Commission his belief that Chibardun could construct a cable system without first obtaining a cable television franchise from the City. (Affidavit of Mick Givens, ¶9.)

⁷ Marcus Cable attorneys concurred with the City Attorney's opinion regarding closed negotiation sessions and stated Marcus Cable's preference that any such meetings be open since whatever changes the City agreed to with Chibardun would apply to Marcus Cable. (See Title V of the Cable Franchise Ordinance.) (A copy of the May 13, 1997 letter from Marcus Cable's attorneys to City Administrator Curtis Snyder is attached as Exhibit 5 to the Snyder Affidavit.)

At the April 29 Cable Commission meeting, Chibardun representatives requested again that the Commission hold a closed session for purposes of negotiating changes to the terms of the Cable Franchise Ordinance. (Affidavit of Mick Givens, ¶12; see also Minutes from April 29, 1997 Cable Commission Meeting, attached as Exhibit 3 to the Givens Affidavit). The Commission Chairman explained that, on the advice of counsel, the meeting needed to remain open. (Affidavit of Mick Givens, ¶12; see also Minutes from April 29, 1997 Cable Commission Meeting.) Chibardun representatives then reiterated the changes the company wanted the Commission to make to the Cable Franchise Ordinance. (Affidavit of Mick Givens, ¶13.) Since the Cable Commission does not have authority to amend City ordinances, the Commission moved to refer Chibardun's requested changes to the City of Rice Lake Common Council, the body that has the requisite authority. (Affidavit of Mick Givens, ¶14; see also Minutes from April 29, 1997 Cable Commission Meeting.)

By letter dated May 2, 1997, Chibardun's General Manager, Rick Vergin, wrote to City Administrator Curtis Snyder, making "an official request to provide cable television service to residents of the City of Rice Lake." (A copy of Mr. Vergin's letter is attached as Exhibit 2 to the Snyder Affidavit.) In this letter, Mr. Vergin specified the changes Chibardun wanted made to the City's Cable Franchise Ordinance: that Chibardun wanted three years in which to make cable television service available to all areas of Rice Lake, and that the company wanted an exemption from the requirement that it maintain a local office in Rice Lake. (*Id.* at pp. 1-2.) In this letter, Mr. Vergin also indicated that the cable needed to supply television signals had to be ordered by June 1, less than a month away, and threatened

that if the City did not reach a decision or provide indication that it would allow the company to bury the cable, the opportunity for competition in the cable TV market in Rice Lake could be gone forever. (Id. at p. 2.)

Chibardun's cable franchise matter first came before the Rice Lake Common Council at the Council's May 13, 1997 meeting. (Affidavit of Mick Givens, ¶16.) The Council was briefed on the Chibardun matter by Mick Givens, the City's Cable Director. (A copy of Mr. Given's May 8, 1997 Briefing Report to the Council is attached as Exhibit 4 to the Givens Affidavit.) In this Briefing Report, Mr. Givens explained that Chibardun wished to construct and operate a telecommunications and cable television system in the City. (Briefing Report, p. 1.) He also described Chibardun's previous meetings with the Cable Commission, the changes Chibardun wanted made to the City's Cable Franchise Ordinance and communications received from Chibardun. (Id.) In addition, Mr. Givens raised specific concerns with a decision to grant Chibardun a franchise under the terms it was requiring, including his concern about Chibardun's ability to meet the public, educational, and governmental access requirements set forth in the Cable Franchise Ordinance and the fact that Chibardun had provided the City with very little information about the company and about its plans. (Id. at pp. 1-2.) Mr. Givens recommended that the Common Council authorize the hiring of a consultant and/or an attorney to develop a telecommunications ordinance and to advise the City regarding Chibardun's request for a cable television franchise. (Id. at p. 3.) After considering statements by Chibardun and statements and written material submitted by Marcus Cable, the Council adopted Mr. Given's

recommendation and voted to hire a consultant to draft a telecommunications ordinance and to advise the City regarding Chibardun's request for a cable television franchise. (Affidavit of Mick Givens, ¶19.)

By letter dated May 23, 1997, City Administrator Curtis Snyder responded to Chibardun's May 2, 1997 letter containing an official request for a cable television franchise. (A copy of Mr. Snyder's May 23, 1997 letter is attached as Exhibit C to the Chibardun Petition.) In this letter, Mr. Snyder stated the City's position that Chibardun could not construct a cable television system without a cable franchise. (May 23, 1997 Letter, p. 1.) He also explained that the City needed additional information from Chibardun so that it could act on Chibardun's franchise request. (*Id.*) Mr. Snyder explained the City's authority under 47 U.S.C. §541(a)(4) to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial, technical, or legal qualifications to provide cable service," and informed Chibardun that these determinations could not be made "on the basis of the limited information Chibardun has submitted." (*Id.* at pp. 1-2.) Mr. Snyder provided Chibardun with an attachment specifically listing the information the City needed so that it could consider the

company's request for a cable franchise.⁸ (Id. at p. 2.) To date, Chibardun has never supplied the requested information. (Affidavit of Curtis Snyder, ¶11.)

By letter dated July 8, 1997, Marcus Cable requested that the City begin cable franchise renewal negotiations and submitted a renewal proposal in the form of a draft cable television ordinance and franchise agreement for the City to consider. (A copy of this July 8, 1997 letter is attached as Exhibit 6 to the Snyder Affidavit.) On September 15, 1997, Chibardun wrote to the City asking to be involved in the renewal of Marcus Cable's franchise. (A copy of the September 15, 1997 letter is attached as Exhibit 7 to the Snyder Affidavit.) The City responded with a September 23, 1997 letter in which it informed Chibardun that it was pleased to learn that the company was still interested in providing cable television service in Rice Lake and that it intended to involve Chibardun in the renewal process. (A copy of the September 23, 1997 letter is attached as Exhibit 8 to the Snyder Affidavit.) The City also repeated its request that Chibardun supply the information sought in the May 23, 1997 letter. (Id.) Chibardun has never provided this information to the City. (Affidavit of Curtis Snyder, ¶11.)

⁸ The City recently learned that the information the City requested was the same type of information the City of Barron ("Barron"), Wisconsin, requested before Barron would act on Chibardun's request for a cable franchise. (Affidavit of Mick Givens, ¶23.) While Chibardun supplied the information to Barron, Chibardun has never explained why it would not supply the City of Rice Lake with the same information. (Affidavit of Mick Givens, ¶23.)

C. Chibardun's Rights-of-Way Permit Discussions.

In contrast to its pursuit of a cable franchise from the City, it was not until late May of 1997 that Chibardun began pursuing the approvals necessary for constructing its proposed telecommunications and cable television system within the City rights-of-way. In fact, it was not until May 20, 1997, less than two weeks before the date Chibardun stated that it wished to begin constructing the system, that the company submitted permit applications pursuant to Sections 6-2-3 and 6-2-4 of the Rice Lake Municipal Code for approval to excavate and begin construction in public rights-of-way. (Affidavit of Mick Givens, ¶21.) By these permit applications, Chibardun sought approval to excavate and construct its network in more than six miles of public rights-of-way. (Affidavit of Mick Givens, ¶21.)

The very next day after it submitted the permit applications, on May 21, 1997, Chibardun submitted a request to be placed on the agenda for the Rice Lake Common Council meeting of May 27, 1997, "in the matter concerning the denial of Chibardun's street right-of-way permits." (A copy of Chibardun's May 21, 1997 request is attached as Exhibit 9 to the Snyder Affidavit.) The timing of this request, together with Chibardun's claim of a purported "denial" of its applications, raises serious question as to the motives underlying Chibardun's actions. The City would like to assume that Chibardun was acting in good faith and attribute the company's claim of a "denial" only one day after submitting its permit applications as reflection of Chibardun's mistaken belief that it should be granted "rubber stamped" permits the same day they were applied for and that the company, again mistakenly, construed the fact that the permits were not granted immediately as a denial of

its applications. However, the absurd notion that Chibardun was entitled to “rubber stamped” permits or that the City could grant permits without evaluating permit applications that entailed excavation and construction within more than six miles of City rights-of-way casts serious doubt on Chibardun’s intention. One wonders whether Chibardun was trying to set the City up and somehow create a “record” that it intended to use to file its Preemption Petition. One can only guess, but the timing of Chibardun’s actions raises questions about whether the company was acting in good faith in its efforts.

Despite such questions, the City continued trying to work with Chibardun. In his May 23, 1997 letter to Chibardun, City Administrator Curtis Snyder responded to the May 20, 1997 permit applications and informed Chibardun that the City was reviewing the permit requests and intended to act on the requests “in due course.” (May 23, 1997 Letter, p. 2, Exhibit C to the Chibardun Petition.) Mr. Snyder also explained that the City was planning to develop and adopt a telecommunications ordinance to regulate use of public rights-of-way “by telecommunications service providers.”⁹ (*Id.*) He specifically described that the ordinance would:

(1) set out the terms and conditions governing the use of public rights-of way; (2) require a right-of-way user to register with the City and provide information regarding the user’s intended operation within the City; (3) impose insurance and indemnification requirements; and (4) require the user to enter

⁹ It should be noted that this letter does not target Chibardun alone, but provides that the regulation would apply to all telecommunications service providers. There is nothing in Mr. Snyder’s letter, or anywhere else, to support Chibardun’s claim that the City was drafting regulations that would be directed only to Chibardun.

into a written agreement to pay an occupancy fee designed to recover the cost of regulation.

(Id.)

To address potential concerns of delay resulting from the time involved in developing such an ordinance, Mr. Snyder offered Chibardun an opportunity to enter into a license agreement with the City. (Affidavit of Curtis Snyder, ¶12; May 23, 1997 Letter, p. 2.) Mr. Snyder specifically informed Chibardun that the license agreement “would grant a permit and license to Chibardun to occupy and use the public rights-of-way to construct, operate and maintain a telecommunications network within the City.” (May 23, 1997 Letter, p. 2.) The purpose of the license agreement was to provide a way for Chibardun to proceed with its plans without waiting for the final ordinance to be drafted, while at the same time protecting the City’s interests in managing its public rights-of-way by identifying the terms and conditions under which Chibardun’s construction and operation within the rights-of-way would proceed. (Affidavit of Curtis Snyder, ¶13.) So that the City could work on providing Chibardun with specific terms to consider for the agreement, Mr. Snyder asked Chibardun for information about the company’s plans for the telecommunications system within the City. (May 23, 1997 Letter, p. 2.) Chibardun never supplied the requested information. (Affidavit of Curtis Snyder, ¶13.)

Despite not having the requested information from Chibardun, the City prepared a draft license agreement (hereafter referred to as the “License Agreement”) and sent it to Chibardun’s attorneys for review on June 6, 1997. (A copy of the License Agreement and

the June 6, 1997 cover letter from the City's counsel is attached as Exhibit E to the Chibardun Petition.) The June 6, 1997 License Agreement was presented in draft form, as a proposal. It was not a document that Chibardun was required to sign as is. (Affidavit of Curtis Snyder, ¶14.) The License Agreement itself is marked as a "draft." Moreover, in her June 6 cover letter, counsel for the City stated that "the City proposes that [Chibardun] enter into a license agreement . . .," and that she was enclosing "the proposed license agreement." (June 6, 1997 letter from Anita Gallucci to Gerard Duffy (emphasis added).) The City intended that the two parties would negotiate and reach mutual agreement on the terms of the License Agreement. (Affidavit of Curtis Snyder, ¶14.)

Chibardun chose not to negotiate. Instead, in a June 9, 1997 letter to the City Mayor and City Administrator, Chibardun announced that it would "cancel it's [sic] current plans to provide Cable TV and Telephone service to the citizens of Rice Lake" . . . and . . . "file a 'Preemption Petition' with the Federal Communications Commission." (A copy of this June 9, 1997 letter is attached as Exhibit 3 to the Snyder Affidavit.) Chibardun's unwillingness to even discuss the draft license agreement again raises question as to the company's motive. Rather than review the draft agreement and bring any concerns it may have had to the City for discussion, Chibardun filed its Petition with the Commission. Although Chibardun attempts to paint a picture of trying to work with the City and actually pursuing the requisite permits, the facts show quite the contrary. The City acted with flexibility trying to accommodate the timeline that Chibardun itself imposed and was willing to discuss concerns Chibardun may have had. (Affidavit of Curtis Snyder, ¶14.)

Unfortunately, the City was hard pressed to negotiate with Chibardun and address its concerns when the company refused to even bring its concerns to the table.

In addition to showing Chibardun's unwillingness to discuss the terms of the License Agreement, the company's June 9 letter also reflected that Chibardun was withdrawing its permit applications. Not only did the company say that it was canceling its plans, but Chibardun concluded the letter, stating:

Notwithstanding these changes in plans, [Chibardun] may still be interested in providing telephone service to the citizens of Rice Lake in following years, if allowed to enter the telecommunications market in a non-discriminatory manner. [Chibardun] will evaluate the political climate, any Rice Lake "Telecommunications Ordinance" and customer feedback to make a determination at that time.

(June 9, 1997 Chibardun Letter, p. 2.) Based on this letter, it was clear that Chibardun was canceling its plans to begin construction during 1997 and thereby was withdrawing its permit applications. (Affidavit of Curtis Snyder, ¶17; Affidavit of Mick Givens, ¶22.) On June 23, 1997, Mr. Snyder responded and expressed to Chibardun the City's dismay at Chibardun's decision to cancel its plans without even discussing the proposed License Agreement. (A copy of Mr. Snyder's June 23, 1997 response is attached as Exhibit 10 to the Snyder Affidavit.) Mr. Snyder explained that the City welcomed Chibardun and competition but that it also needed to protect its interests in the management of local rights-of-way. (June 23, 1997 Letter, p. 1.) Mr. Snyder also explained that the City's intent was "to regulate the use of the local rights-of-way by all telecommunications providers." (*Id.* (emphasis added).) To enable Chibardun to begin construction immediately, Mr. Snyder offered Chibardun the